

89- 1470

Supreme Court, U.S.
FILED

JAN 11 1990

JOSEPH F. SAPNIOL, JR.
CLERK

Case No. _____

IN THE
**Supreme Court of the United States
of America**

Term

CITY OF TONGANOXIE,
Respondent

vs.

JOHN M. JACK,
Petitioner

**ON WRIT OF CERTIORARI FROM THE
SUPREME COURT OF THE STATE OF KANSAS**

JOHN MARSHALL JACK
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P. O. Box 274
Tonganoxie, Kansas 66086
(913) 845-2800

QUESTIONS PRESENTED FOR REVIEW

1. Is it a Denial of Equal Protection and Due Process for a State to Have Different Requirements in Municipal Court and State Courts as to Whether a CRIMINAL COMPLAINT NEEDS TO BE VERIFIED?

2. Is it a Denial of Due Process to Allow a Prosecution of an Individual Upon an Unsworn Complaint?

The pertinent part of the 14th Amendment to the United States Constitution reads:

“ . . . nor shall any State deprive any person of life, liberty and property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.”

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CITY OF TONGANOXIE,
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vs.

JOHN M. JACK,
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ON WRIT OF CERTIORARI FROM THE
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Your Petitioner, who is 89 years of age, was charged with violating a City Ordinance prohibiting driving while under the influence of alcohol. The complaint under the laws of the State of Kansas, (K.S.A. 1988 Supp. 12-4205), as they apply to Municipal Courts, was not verified. Your Petitioner asked that the charges be dismissed under the rationale of *State v. Fraker*, 12 Kan. App. 2d 259, 739 P.2d 940 (1987) as modified, 242 Kan. 446, 748 P.2d 868 (1988)*. This request was denied and your Petitioner entered a plea of no contest. He was found guilty.

* This case involved questions of State Law and does not rest on Constitutional principals.

Thereupon, your Petitioner appealed to the District Court of Leavenworth County, Kansas. Under the laws of the State of Kansas, he was granted a trial De Novo. Once again he asked the Court to dismiss the case based upon the rationale found in the *Fraker* decision. He also believes that at this time he raised the Constitutional arguments he raises herein. His request for dismissal was denied. Thereafter, after consulting with his counsel and the City Prosecutor, he agreed to plead no contest if this would not interfere with his right to appeal. After being assured that it would not interfere with his appellate rights, your Petitioner entered a plea of no contest and was found guilty.

Your Petitioner then perfected an appeal to the Court of Appeals of the State of Kansas, based upon his interpretation of the *Fraker* decision and upon his contention that the differences between the laws of Kansas as to the requirements for filing a criminal complaint in a Municipal Court and State Court were violative of Equal Protection and Due Process. While the Court discussed the issue brought up by the *Fraker* case and how it applied to Municipal Courts at length, it devoted less than six lines of its opinion to his Constitutional arguments.

Your Petitioner then filed a Petition for Review in the Supreme Court of the State of Kansas seeking review of the State Law questions and Constitutional questions he had raised. This Petition was denied.

APPLICABLE LAW

K.S.A. 1988 Supp. 12-4205, which applies to Municipal Court in the State of Kansas, reads:

"Uniform complaint and notice to appear. In all cases a complaint and notice to appear may be made in the form of the uniform complaint and notice to appear which shall be deemed sufficient if in substantially the following form:

**UNIFORM COMPLAINT
AND NOTICE TO APPEAR**

STATE OF KANSAS

COUNTY OF _____

CITY OF _____

The undersigned, complains that on the _____ day of
_____, 19____, at _____ p.m. (a.m.)

Name _____
(Please Print)

Street Address _____

City _____ State _____

Birth Date _____ Sex _____

Chauf. Driv. Lic. No. _____

Did unlawfully at _____

TRAFFIC

(Operate) a vehicle: Veh. Lic. No. _____

State _____ Yr. _____

Make _____ Model _____ Color _____

By: ☐ Speeding (Over limit)
_____ mph in _____ mph zone

- ☐ Disobeyed Traffic Signal ☐ Disobeyed Stop Sign
☐ Followed too Closely ☐ Failure to Yield right-of-way
☐ Careless Driving ☐ Reckless Driving
☐ Driving While Under the Influence of Intoxicating Liquor
or Drugs
☐ Inadequate Muffler

Other Traffic Violations _____

(Park)

- ☐ Overtime ☐ Prohibited Area ☐ Double Parking
OTHER VIOLATIONS (NON-TRAFFIC)

All In Violation of Section(s) _____
of Ordinance No. _____ of _____ Kansas.
Signature of Officer or
Complainant _____ No. _____
*Sworn to Postively Before Me This _____ day of _____
19 _____

Municipal Judge

(*This Complaint is not required to be sworn if it is signed by a
law enforcement)

NOTICE TO APPEAR

The City of _____, Kansas, To the Above-Named
Person

You are hereby summoned to appear before the Municipal
Court of _____, Kansas, at _____ on the _____
day of _____, 19 _____ at _____ o'clock
_____.m., to answer the above complaint.

If you fail to appear a warrant will be issued for your ar-
rest.

Dated _____, 19 _____.

SIGNATURE OF OFFICER

I agree to appear in the Court at the stated time and place.

Signature of Accused Person

RETURN

The undersigned hereby certifies that on the _____, day of
_____, 19 _____, the notice to appear was served, mailed
or delivered.

Law Enforcement Officer

K.S.A. 22-2202(b), which applies to District Courts in the State of Kansas, reads:

“Complaint” means a written statement under oath of the essential facts constituting a crime, except that a citation or notice to appear issued by a law enforcement officer pursuant to and in compliance with K.S.A. 8-2106 and amendments thereto or a citation or notice to appear issued pursuant to and in compliance with K.S.A. 32-155a and amendments thereto shall be deemed a valid complaint if it is signed by the law enforcement officer.”

K.S.A. 8-2104 reads:

“When person to be taken before judge of district court; arrest at discretion of officer, when; traffic citation only in certain cases. (a) When a person is stopped by a law enforcement officer for any violation of any provision of the uniform act regulating traffic on highways not amounting to a felony, the person shall be taken into custody and taken without unnecessary delay before a judge of the district courts, as specified in subsection (d) of K.S.A. 8-2106 and amendments thereto if:

(1) Such person demands an immediate appearance before a judge; or

(2) such person is to be charged with a violation of K.S.A. 8-262, 8-1567, 8-1568, 8-1602, 8-1603 or 8-1604, and amendments thereto.

(b) When any person is stopped by a law enforcement officer for any violation of any provision of the uniform act regulating traffic on highways, which violation is a misdemeanor, and is not required to be taken before a judge of the district court as provided in subsection (a), the person, in the discretion of the law enforcement officer, may be taken into custody and taken without unnecessary delay before a judge of the district court, as specified in subsection (d) K.S.A. 8-2106 and amendments thereto.

(c) When any person is stopped by a law en-

forcement officer for any violation of any provision of the uniform act regulating traffic on highways, which violation is a traffic infraction, of the district court as provided in subsection (a), the person shall not be taken before a judge of the district court.

(d) When any person is stopped by a law enforcement officer and is to be charged with violation of any statute defining a traffic violation which is a felony, the person shall be taken without unnecessary delay before a judge of the district court as specified in subsection (d) of K.S.A. 8-2106 and amendments thereto."

JURISDICTIONAL STATEMENT

The Court of Appeals of the State of Kansas, rendered its decision in this case on September 1, 1989. Thereafter, your Petitioner filed a Petition for Review in the Supreme Court of the State of Kansas. That Court issued an Order denying the Petition on November 8, 1989. The Supreme Court of the United States has jurisdiction pursuant to 28 U.S.C. 1257.

REASON FOR GRANTING THE WRIT

The Court should use its supervisory powers to review the decisions of the State of Kansas' Courts in this instance as they are restricting the rights of a citizen under the United States Constitution.

RESPECTFULLY SUBMITTED BY:

JOHN MARSHALL JACK
PRO SE
P.O. Box 274
Tonganoxie, Kansas 66086
(913) 845-2800

No. 63,218

IN THE
COURT OF APPEALS OF THE
STATE OF KANSAS

CITY OF TONGANOXIE,
Appellee,

v.

JOHN M. JACK,
Appellant

SYLLABUS BY THE COURT

1.

The requirement set forth in *State v. Fraker*, 12 Kan. App. 2d 259, 739 P.2d 940 (1987), that a prosecution for DUI under K.S.A. 8-1567 and amendments thereto may only be commenced by the filing of a verified complaint or information, does not apply to prosecutions for violations of municipal ordinances for DUI under chapter 12 of the Kansas Statutes Annotated.

2.

A prosecution in a municipal court for the violation of a city ordinance prohibiting DUI is properly commenced by the filing of the statutory uniform complaint and notice to appear form which is described and set forth in K.S.A. 1988 Supp. 12-4205. The complaint is not required to be sworn to if it is signed by a law enforcement officer.

Appeal from Leavenworth District Court; FREDERICK N. STEWART, judge. Opinion filed September 1, 1989. Affirmed.

John M. Jack, appellant, pro se.

Michael Crow and G. Ronald Bates, Jr., of Crow & Bates of Leavenworth, for the appellee.

Before GERNON, P.J., LEWIS, J., AND DAVID F. BREWSTER, District Judge, assigned.

LEWIS, J: The appellant, John M. Jack, appears before this court pro se to appeal his conviction for driving under the influence of alcohol in violation of Ordinance No. 763, Article VI, Section 30, of the municipal code of the City of Tonganoxie. Appellant refers to himself as John M. Jack, also known as J. M. Jack and Marshall Jack. We shall refer to him as Jack and the appellee as City.

Jack was arrested by the city police in Tonganoxie on February 28, 1987, and charged with driving under the influence of alcohol. At the time of the arrest, he was served with a uniform complaint and notice to appear as authorized by and in the form prescribed by K.S.A. 1988 Supp. 12-4205. The complaint was signed, but not verified, by the arresting officer.

Jack appeared before the municipal court and entered a plea of nolo contendere to the charge and was found guilty of DUI. Jack insists in his brief that at the municipal court level he moved to dismiss the complaint for lack of verification. There is nothing in the record to support his argument in this regard and the city attorney denies that any such motion was raised before the municipal judge.

Jack appealed his conviction to the district court and once again entered a plea of nolo contendere to the charges and was again found guilty of DUI. Once again, Jack insists he raised the issue of jurisdiction in the district court. While we find no written motion filed by Jack to that effect, we do find that the City filed a response to such a motion and that the motion was addressed and denied by the trial court.

Since this was Jack's second DUI offense, he was sentenc-

ed to 90 days in jail, with all but five days suspended; fined \$500; ordered to attend eight alcohol abuse sessions; assessed costs; and had his license suspended for 120 days or until completion of the alcohol programs, whichever is longer. His license was then restricted for the remainder of one year. The district court further ordered that, prior to a restricted driver's license being issued to Jack, he should be required to pass a driver's test. Jack conceded he has served his five days in jail and has completed his alcohol abuse education, but has not paid his fine or costs, and still retains his driver's license.

Jack appeared before this court pro se at a hale and hearty 89 years of age. We gather he believes that *State v. Fraker*, 242 Kan. 466, 748 P.2d 868 (1988), applies to his case and that, since the complaint with which the action was commenced was not verified, his conviction must be reversed.

We have examined *Fraker* rather carefully, both the decisions issued by this court and by the Supreme Court, and hold that *Fraker* is authority only for those prosecutions for DUI which were commenced under K.S.A. 8-1567 and amendments thereto; it does not apply to prosecutions commenced under chapter 12 of the Kansas Statutes Annotated, which applies to municipal court prosecutions.

When *Fraker* was handed down by the Court of Appeals in *State v. Fraker*, 12 Kan. App. 2d 259, 739 P.2d 940 (1987), it attracted a great deal of press coverage and stirred up a great deal of commotion.

It is sometimes forgotten that *Fraker* is simply a case involving statutory construction. It does not stand for, has never stood for, and did not attempt to stand for any constitutionally protected rights of individuals charged with DUI. It simply interpreted the statutes under which *Fraker* was prosecuted and concluded that, based on those statutes, the complaint had to be verified. The mere fact the courts have concluded that a complaint to prosecute for DUI under 8-1567 must be verified does not compel a decision that complaints filed under K.S.A. chapter 12 must also be verified.

The facts in 12 Kan. App. 2d 259 were simple; Fraker had been issued a uniform complaint and notice to appear when he was arrested by the Kansas Highway Patrol for violation of DUI, K.S.A. 1985 Supp. 8-1567(a). The uniform complaint and notice to appear was not sworn to by the highway patrolman and the State did not file a complaint or information. This court concluded that a prosecution for driving under the influence of alcohol or drugs under 8-1567 could be commenced only by filing a complaint or information. We cited K.S.A. 1985 Supp. 22-2202(8), which defined complaint as follows:

“ ‘ “Complaint” means a written statement under oath of the essential facts constituting a crime, *except that a notice to appear issued by a law enforcement officer pursuant to and in compliance with K.S.A. 8-2106 and amendments thereto shall be deemed a valid complaint if it is signed by the law enforcement officer.*’ (Emphasis added.)” 12 Kan. App. 2d at 260.

We then concluded that the uniform complaint and notice to appear, if signed by the law enforcement officer, would be valid, even though not verified, if it was issued pursuant to and in compliance with K.S.A. 1985 Supp. 8-2106(a), which read as follows:

“ ‘(a) When a person is stopped by a police officer for any violations of any provision of the uniform act regulating traffic on highways, which violation is a misdemeanor or a traffic infraction and *is not required to be taken before a judge of the district court*, the officer may prepare and deliver to the person a written traffic citation. . .’ (Emphasis added.)” 12 Kan. App. 2d at 260.

We further pointed out that DUI, under 8-1567, was one of those offenses in which the individual arrested was required to be taken immediately before a judge of the district court by K.S.A. 1985 Supp. 8-2104. Our court in *Fraker* concluded as follows:

“A police officer is required to take a person stopped for violating K.S.A. 1985 Supp. 8-1567 before a judge of the district court, and, therefore, K.S.A. 1985

Supp. 8-2106(a) does not give the officer authority to issue the person a traffic citation." 12 Kan. App. 2d at 261.

We concluded that in *Fraker* the citation for DUI was issued pursuant to K.S.A. 1985 Supp. 8-2106 and that, as a result, such prosecution could not be commenced by the uniform complaint and notice to appear, but required the State to file a formal, verified complaint or information.

The Kansas Supreme Court affirmed with modifications our decision in *Fraker* in 242 Kan. 466. A reading of the Supreme Court's opinion clearly reveals that *Fraker* was not breaking any new ground, insofar as constitutional rights for defendants are concerned, and was not issuing any sweeping commands insofar as the use or non-use of the uniform complaint and notice to appear is concerned. That *Fraker* decision dealt solely with the construction of statutes in chapter 8 of the Kansas Statutes Annotated. On pages 466-67 of the Kansas Supreme Court opinion, it states:

"We agree with the statutory history as set forth in the opinion of the Court of Appeals. Prosecutions in this state have historically been commenced with the filing of a sworn complaint. See K.S.A. 62-602 (Corrick) and prior law and case annotations cited thereunder. This was carried over into our revised code of Criminal Procedure adopted in 1970. See L. 1970, ch. 129, §§ 22-2202(6), -2301. The 1972 legislature first authorized the use of notices to appear, signed by law enforcement officers, as complaints. See L. 1972, ch. 120, § 1(6). *Prosecutions for driving under the influence of alcohol could be commenced by the issuance of the uniform traffic citation until January 1, 1985. On that day new statutes became effective, and since then prosecutions for DUI must be commenced with the filing of a verified complaint.* Unsworn traffic citations may no longer be used as a complaint in DUI cases; or in cases when the driver is charged with driving while his or her license is suspended, revoked, or cancelled, K.S.A. 1986 Supp. 8-262; or with fleeing from a police vehicle, K.S.A.

8-1568; or with failing to stop or to give information after an accident involving damage to property or death or personal injury, K.S.A. 8-1602, -1603, and K.S.A. 1986 Supp. 8-1604 K.S.A. 1986 Supp. 8-2104(d) requires the arresting officer to take a motorist arrested for those offenses or for any traffic violation which is a felony before judge of the district court without unnecessary delay. K.S.A. 1986 Supp. 8-2106 authorizes the use of traffic citations for various misdemeanors and traffic infractions when the person 'is not required to be taken before a judge of the district court.' Since DUI is one of those offenses for which the accused must be taken before a judge of the district court without unnecessary delay, an unsworn traffic citation cannot be used as a complaint when a charge of this offense is to be made. The legislature has limited the use of the unsworn traffic citation as a complaint. Its use in DUI cases is no longer authorized." (Emphasis added.)

It appears obvious to this court that *Fraker* dealt with an interpretation of how prosecutions are commenced under chapter 8 and that it was necessitated by the amendment of various statutes in chapter 8 by the Kansas Legislature. The decision does not purport to deal with, nor does it deal with, complaints filed under the code for municipal courts, chapter 12 of the Kansas Statutes Annotated, specifically at K.S.A. 12-4101 *et seq.* This code governs practice and procedure in all cases in municipal court. The uniform complaint and notice to appear form used by the City of Tonganoxie in this case is specifically approved under K.S.A. 1988 Supp. 12-4205.

While the language in *Fraker* is rather sweeping, it appears to say that the unsworn traffic citation is no longer authorized for use in DUI cases. That statement must be taken in context of the opinion. We are not dealing with DUI cases commenced under the municipal code, but with DUI cases commenced under chapter 8, and the language in *Fraker* is limited to those prosecutions.

The legislature has had sufficient time since the *Fraker*

decisions to extend the same statutory requirements to prosecutions under the municipal code but has not seen fit to do so. Indeed, it would appear that the 1988 legislature took action in amending K.S.A. 1987 Supp. 8-2106, which may very well repeal the requirement in *Fraker*, although we certainly do not reach that issue and do not imply that we are holding that such is the case.

Jack's reliance on *Fraker* is misplaced. This court holds that *Fraker* has no application to Jack's case and that his conviction of DUI under the ordinances of the City of Tonganoxie is affirmed.

We further hold that the differences in procedural rules for municipal courts and district courts, in charging the defendant with the crime of DUI, do not violate Jack's rights under the Fourteenth Amendment of the United States Constitution or under Article 2, § 17 of the Kansas Constitution.

Affirmed.

**IN THE
SUPREME COURT OF THE STATE OF KANSAS**

CITY OF TONGANOXIE,

APPELLEE,

Vs.

No. 89-63218-A

JOHN M. JACK,

APPELLANT.

You are hereby notified of the following action taken in the
above entitled case:

PETITION FOR REVIEW.

CONSIDERED BY THE COURT AND DENIED.

Date: November 8, 1989

Yours very truly,

LEWIS C. CARTER
Clerk, Supreme Court

